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Attorneys for Defendants and Counter-Claimants,
 BILLING SOLUTIONS INCORPORATED, SEAN
 DUNLEA, TIM PORTLEY, DARIO J. SAAL, and
 SAAL CONSULTING INC.

Attorneys for Plaintiff and Counter-
 Defendants, TELSWITCH, INC.,
 AARON WOOLFSON, JERRY
 MERKT, and MERKT-WOOLFSON

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

TELSWITCH, INC.,

Plaintiff,

v.

BILLING SOLUTIONS INCORPORATED, an
 Illinois corporation, SEAN DUNLEA, an individual,
 TIM PORTLEY, an individual, DARIO J. SAAL, an
 individual, SAAL CONSULTING INC., a Florida
 corporation and DOES ONE THROUGH
 TWENTY, inclusive,

Defendants.

Case No. CV 12 0172 EMC

**DEFENDANTS' REQUEST TO
 VACATE SETTLEMENT
 CONFERENCE & PLAINTIFF'S
 NON-OPPOSITION ; ORDER (Denied)**

The Honorable Edward M. Chen

BILLING SOLUTIONS INCORPORATED, an
 Illinois corporation, SEAN DUNLEA, an individual,
 and TIM PORTLEY, an individual,

Counter-claimants,

v.

TELSWITCH, INC., MERKT-WOOLFSON,
 AARON WOOLFSON, JERRY MERKT and ROES
 1-50

Counter-defendants.

1 Plaintiff and Counter-Defendant TelSwitch, Inc. (“TelSwitch”) and Counter-Defendants
 2 Merkt-Woolfson, Aaron Woolfson and Jerry Merkt (collectively, “Plaintiff/Counter-Defendants”) and
 3 Defendants Billings Solutions, Inc. (“BSI”), Sean Dunlea, Tim Portley, Dario Saal and Saal
 4 Consulting (collectively, “Defendants”), and Counter-Claimants BSI, Sean Dunlea, and Tim Portley
 5 (collectively, “Counter-Claimants”) and collectively with Plaintiff/Counter-Defendants, the
 6 (“Parties”) hereby submit this joint statement.

7 **I. DEFENDANTS AND COUNTER-CLAIMANTS’ STATEMENT**

8 Defendants/Counter-Claimants respectfully request that the Court vacate the Settlement
 9 Conference currently set for February 22, 2013 before Magistrate Westmore.

10 As the Court will recall, at the January 29, 2013 hearing on Defendants’ Motion for
 11 Summary Judgment, the Court suggested that the parties might want to participate in a voluntary
 12 settlement conference or other form of ADR before the Court rules on the motion. The Court then
 13 gave the parties until February 1, 2013 to report back as to whether they wanted to engage in further
 14 ADR and if so, what type.

15 Defendants/Counter-Claimants initially suggested that Magistrate Beeler would be an
 16 effective Settlement Conference Judge as she already knows the case, having ruled on Plaintiff’s
 17 trade secret disclosure issue. Plaintiff/Counter-Defendants rejected Defendants’ proposal that
 18 Magistrate Beeler act as Settlement Conference Judge. As a compromise, after meet and confer,
 19 Defendants/Counter-Claimants agreed to participate in a settlement conference before another
 20 Magistrate subject to the condition that only counsel would appear in person at the conference and
 21 all parties would appear by phone. This agreement is specifically reflected in the parties’ February
 22 1, 2013 joint letter to Judge Chen (Doc. 98).

23 After the case was assigned to Magistrate Westmore, the parties confirmed the agreed
 24 procedure that the parties would appear by phone and counsel would appear in person.
 25 Subsequently, Plaintiff’s counsel informed Defendants/Counter-Claimants that he would now insist
 26 that his client be present at the settlement conference while Defendants/Counter-Claimants could
 27 appear by phone. Defendants/Counter-Claimants explained that this change is not acceptable, but
 28 Plaintiff/Counter-Defendants have remained steadfast.

1 The reason that the pre-condition that all parties appear by phone is important is that the
2 parties already participated in a full day of JAMS mediation with Judge James Warren (Ret) in
3 November 2012 that was unsuccessful. Defendants/Counter-Claimants incurred a great deal of
4 expense in connection with the preparation for and travel to that mediation from various out of state
5 locations (Illinois, Rhode Island and Florida). While Defendants/Counter-Claimants remain willing
6 to engage in ADR, they do not want have to again incur large travel and legal expense in connection
7 with it. They also want to ensure that both parties are on equal footing and believe that there will be
8 an unfair advantage if Plaintiff is present at the Settlement Conference when they cannot be. Thus,
9 since the necessary pre-condition for further ADR – that the parties participate by phone – has been
10 rejected after-the-fact by Plaintiff/Counter-Defendants, the currently scheduled Settlement
11 Conference should be vacated.

12 Accordingly, Defendants/Counter-Claimants respectfully request that the Court vacate the
13 February 22, 2013 Settlement Conference and rule on Defendants' pending Motion for Summary
14 Judgment.

15 **II. PLAINTIFF'S AND COUNTER-DEFENDANTS' STATEMENT**

16 At the January 29, 2013 hearing on Defendants' Motion for Summary Judgment, counsel for
17 Defendants expressed concern about the travel and legal expense that Defendants would incur by
18 engaging in a second ADR attempt. Counsel therefore requested that Defendants be permitted to
19 appear telephonically for further ADR. Plaintiff had no objection to allowing Defendants to appear
20 telephonically. This Court then referred the matter to Judge Westmore for an emergency settlement
21 conference.

22 Counsel never agreed to barring its own clients from appearing personally at the settlement
23 conference. The issue of Plaintiff's appearance at the settlement conference only arose after the
24 settlement conference was scheduled. Plaintiff had always intended to attend the settlement
25 conference in person, believing face-to-face interaction to be more conducive to settlement
26 discussions and therefore preferable whenever possible. And because Defendants' only stated reason
27 for requesting permission to appear telephonically was to limit Defendants' travel and legal
28 expenses, Plaintiff had no reason to believe that its own plans to appear in person (which, of course,

1 would have no impact on Defendants' travel and legal expenses) would be in any way objectionable.
 2 But when Plaintiff noted its intention to appear at the settlement conference in person, Defendants
 3 insisted that the "deal" was that **all** parties would **only** be permitted to appear telephonically (citing
 4 concerns about the parties being on equal footing at the settlement conference).

5 Perhaps this was Defendants' understanding all along, and there was merely a
 6 misunderstanding between the Parties (as noted above, the Parties never explicitly discussed
 7 Plaintiff's appearance at the settlement conference until after the settlement conference was
 8 scheduled). But even if so, Defendants' insistence that Plaintiff be denied the ability to be present at
 9 a settlement conference because of a perceived "unfair advantage" in a voluntary ADR proceeding
 10 hardly seems indicative of a good-faith desire to discuss settlement.

11 Plaintiff desires further ADR and welcomed the Court's order that the Parties engage in a
 12 settlement conference with Judge Westmore. But Plaintiff recognizes that ADR attempts can only be
 13 successful if all parties willingly engage in good faith, and therefore does not oppose Defendants'
 14 request to vacate the settlement conference.

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 16
 17 RIDLESS LAW OFFICE

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 19 DATED: February 6, 2013

/s/ Joshua A. Ridless

Attorneys for Plaintiff and Counter-Defendants,
 TELSWITCH, INC., MERKT-WOOLFSON, AARON
 WOOLFSON and JERRY MERKT

22 DUANE MORRIS LLP

23
 24 DATED: February 6, 2013

/s/ Eric J. Sinrod

25 IT IS SO ORDERED that Defendant's
 26 request is denied. Parties to contact Judge
 27 Westmore to discuss attendance and all
 28 other logistical issues.

Attorneys for Defendants and Counter-Claimants,
 BILLING SOLUTIONS INCORPORATED, SEAN
 DUNN, TIM PORTLEY, DARIO J. SAAL, and
 SAAL CONSULTING INC.,

Edward M. Chen, U.S. District Judge

